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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-543

IN RE: CBS LICENSING ANTITRUST LITIGATION

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.,
Respondents.

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

A & M RECORDS, ET AL.,
Respondents.

RECORD CLUB OF AMERICA, INC.,
Petitioner,

vs.

KINNEY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: November 17, 1976

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents in all three of the above captioned actions submit this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by petitioner Record Club of America, Inc. ("RCOA"). Pursuant to orders of the Judicial Panel on Multi-district Litigation, these three actions had been coordinated before the United States District Court for the Eastern District of Pennsylvania (Hon. E. Mac Troutman, J.) under the joint caption, "In Re: CBS Licensing Antitrust Litigation".

OPINIONS BELOW

In addition to the opinions of the Court of Appeals and the District Court, Exhibits A and B, respectively, in the appendix to the petition, the following orders of the District Court are pertinent:

1. Order of October 22, 1971 (Appendix 1 to this Brief)
2. Order of November 17, 1972 (Appendix 2 to this Brief)
3. Order of April 11, 1973 (Appendix 3 to this Brief)
4. Order of November 1, 1974 (*CBS* action) (Appendix 4 to this Brief)
5. Order of November 1, 1974 (*A & M* and *Kinney* actions) (Appendix 5 to this Brief)
6. Order of December 30, 1974 (Appendix 6 to this Brief)

QUESTION PRESENTED

The petition presents no issue worthy of review by the Supreme Court. The only question it presents is whether this Court should review, on the merits, the holdings below that these three coordinated civil actions were properly dismissed under Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure for RCOA's willful refusal over a period of four years to comply with five discovery orders.

STATEMENT OF THE CASES

Preliminary Statement

Only a few months ago, this Court summarily reversed a decision by the Court of Appeals for the Third Circuit which had overturned a District Court's dismissal of the complaint for failure by plaintiff to comply with discovery orders, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 96 S. Ct. 2778 (1976). Here, the Court of Appeals followed the *National Hockey League* decision and, after reviewing in detail the factual circumstances which led to the District Court's decision, unani-

mously held, on a voluminous record including a 2,663-page appendix, that the District Court did not abuse its discretion in dismissing these cases under Rule 37 of the Federal Rules of Civil Procedure. The dismissal was based on RCOA's willful refusal over a period of four years to comply with five orders of the District Court to answer interrogatories, a course of conduct which the District Court properly termed "disdainful" and "without precedent" (3a).^{*} In a 39-page opinion, the Court of Appeals correctly held that the District Court's order was fully supported by the record.

RCOA argues that its repeatedly rejected attempts to avoid discovery by seeking refuge in Rule 33(c), Fed. R. Civ. P., as an answer to *some* of the interrogatories unilaterally entitled it to disregard totally five orders requiring it to answer those *and other* interrogatories.

The District Court conducted numerous hearings over the period of four years to determine whether or not RCOA's answers were adequate. Each time the District Court found them inadequate and directed further answers. Each time RCOA sought refuge in Rule 33(c), the Court patiently heard argument (and reargument) and considered the evidence as to whether the tendered documents supplied the information sought and whether the burden of obtaining the information was equal as between the parties. The Court read and considered hundreds of pages of affidavits and memoranda and heard the testimony of five witnesses, including the president of RCOA, on whether RCOA had properly responded to the interrogatories. Before dismissing these cases, the Court held five long hearings, including a full day of testimony. Upon this record, the Court of Appeals properly found no abuse of discretion.

On this petition, RCOA asks this Court to reexamine the record and substitute its judgment for that of the District Court and the Court of Appeals.

^{*}References followed by the letter "a" are to pages of the appendix to the petition.

The Facts

A complete description of "the tortuous course of this protracted litigation" (3a) is set forth in the opinions below. The relevant facts can be summarized as follows:

A. The Coordinated Actions

In May 1968, RCOA, by its own designation "the second largest record club in the industry",* filed a complaint in the Eastern District of Pennsylvania against Columbia Broadcasting System, Inc. ("CBS") and a number of other companies alleging violations of the antitrust laws (the "CBS action"). The gravamen of each claim for relief was substantially identical. As stated by the Court of Appeals:

"... the alleged violations arose from certain exclusive licenses granted CBS by the manufacturers [of records and tapes] for purposes of marketing records and tapes through its mail order operations. As a result, RCOA claimed it was forced to purchase similar records and tapes from distributors, manufacturers and others at costs higher than those incurred under CBS licenses." (23a-24a).

Accordingly, a comparison of the cost to RCOA of its purchased records with the cost to CBS of its licensed records was the key issue in the case since the cost differential theory was basic to both the prosecution and the defense.

In June, 1970, RCOA brought a second action against various CBS licensors, including A&M Records, Inc. ("A & M") and several other companies engaged in the manufacture and distribution of records and tapes (the "A & M action"). The action was brought in the Southern District of New York.

**Columbia Broadcasting System, Inc. v. F. T. C.*, 414 F. 2d 974, 981 (7th Cir. 1969). While RCOA was in violation of court orders regarding discovery in these cases, this "small privately owned company" (Petition, p. 4) grew from sales and revenues of \$6,450,567 in 1968 to over four times that amount for the fiscal year ended June 30, 1972.

CBS, although not named as a defendant, was alleged to be a co-conspirator. Except for a claim under § 7 of the Clayton Act, the A & M complaint alleged the same antitrust violations asserted in the CBS action, i.e., that the licenses to CBS resulted in RCOA's cost of records being substantially higher than the cost to CBS of the same records. Once again, the cost differential theory was the key issue in this case.

In January, 1971, the A & M action was transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of Pennsylvania for "coordinated or consolidated pre-trial proceedings" with the CBS action, *In re CBS Licensing Antitrust Litigation*, 328 F. Supp. 511, 512 (J. P. M. D. L. 1971).

In November, 1971, RCOA brought a third action concerning the CBS licensing policies, this time against Kinney Services, Inc. and Warner-Elektra-Atlantic Distributing Corp. (collectively "Kinney"), respectively the parent company and the record distribution affiliate of various licensors of CBS (the "Kinney action"). Like the A & M action, the Kinney action was initially filed in the Southern District of New York. The gravamen of RCOA's complaint in the Kinney action was essentially identical to that in the CBS and A & M actions. RCOA contended that the defendants conspired with other "co-conspirators", including CBS, to enter into so-called "reciprocal exclusionary agreements", the effect of which was to deprive RCOA of licenses to manufacture records and tapes on the various Kinney labels. Again, RCOA claimed that, as a result of defendants' alleged violations of the antitrust laws, its costs of acquiring records and tapes were substantially higher than they would have been under licenses.

In an apparent effort to avoid transfer of the Kinney action to the Eastern District of Pennsylvania, where its two other CBS licensing antitrust actions were pending, RCOA sought to differentiate its Kinney complaint from those in CBS and A & M. To this end, it tacked on to its Kinney complaint a challenge under § 7 of the Clayton Act to Kinney's acquisition of its record manufacturing subsidiaries and the estab-

lishment of a single subsidiary to distribute records and tapes. The Multidistrict Panel thwarted this attempt by RCOA to keep the *Kinney* action in New York. In April, 1972, it directed that the *Kinney* action be transferred to the Eastern District of Pennsylvania for "coordinated pretrial proceedings" with the *CBS* and *A & M* actions, *In re CBS Licensing Antitrust Litigation*, 342 F. Supp. 1177, 1178 (J. P. M. D. L. 1972). In its transfer decision, the Panel said:

"... we agree with Kinney's assertion that all three complaints grow out of a single grievance. The central subject of the complaint is still Record Club's alleged inability to obtain licenses to manufacture and sell phonograph records and tapes, forcing it to purchase finished records and tapes at higher prices than its club competitors and putting it at a competitive disadvantage in the club market. . . . Any inquiry into these allegations will cover factual issues common to the earlier actions." 342 F. Supp. 1177-1178 (emphasis added).

B. The Coordination Order

After the transfer of the *Kinney* action, RCOA moved for an order coordinating discovery in all three actions. On April 11, 1973, the District Court entered such an order which provided, in pertinent part, that all discovery taken or produced in any coordinated action "shall be deemed taken or produced in each such action" (Appendix 3; ¶ 1).*

C. The CBS Interrogatories

On May 19, 1971, CBS served its initial interrogatories on RCOA. The interrogatories sought, *inter alia*, detailed information with respect to RCOA's actual costs of obtaining records, including the amounts of discounts, rebates, advertising allowances and other considerations which RCOA had obtained from its suppliers which necessarily affected such costs (the "cost

*References to "Appendix" are to the appendix to this Brief.

interrogatories"), as well as non-cost information of various kinds including details of the alleged conspiracy and the issue of damages (the "non-cost interrogatories").

On June 23, 1971, RCOA objected generally and specifically to each and every interrogatory. The grounds for objection included Rule 33(c), burden, irrelevancy, prematurity and, finally, a refusal to answer until completion of all other discovery.

On September 3, 1971, CBS filed its first motion for an order compelling RCOA to answer the CBS initial interrogatories and filed supporting affidavits of Richard E. Gilbert and Leo Strauss,* two independent accountants retained by CBS, who had examined RCOA's documents over an extended period of time and who swore that, contrary to RCOA's representation in its objections, the cost information needed by CBS could not be derived by CBS from the RCOA documents.** *RCOA offered no affidavits which controverted the affidavits submitted by CBS.*

The Court heard lengthy oral argument on CBS's motion in which RCOA again advanced its Rule 33(c) contention and asserted that, contrary to the affidavits of the accountants, the cost information was ascertainable from the documents. After considering the affidavits, arguments and lengthy memoranda submitted by the parties, the Court, on October 22, 1971, entered an order directing RCOA to answer *all* of CBS's initial interrogatories, including those to which RCOA had directed its Rule 33(c) objection (Appendix 1; ¶ 9).

*Gilbert was a member of Lybrand, Ross Bros. & Montgomery, nationally known certified public accountants. Strauss was a partner of Prager and Fenton, experts in record industry accounting.

**RCOA's assertion that CBS's accountants did not specify what documents they had reviewed (Petition, p. 6) is without merit. The accountants had examined all documents produced by RCOA in response to CBS's motion pursuant to Rule 34, Fed. R. Civ. P., which had preceded CBS's initial interrogatories. CBS's motion had required the production of all documents showing RCOA's cost of acquiring records—the same information sought by the cost interrogatories. The failure of these documents to reveal the information sought necessitated the propounding of the interrogatories.

On May 19, 1972, *seven months* after the Court's order, RCOA filed its "answers" to the CBS interrogatories. In direct violation of the District Court's 1971 order, RCOA again responded to the cost interrogatories by seeking refuge in Rule 33(c). Also, RCOA again willfully refused to answer certain non-cost interrogatories until completion of all other discovery.

CBS therefore filed its second motion with respect to the interrogatories in September, 1972. This motion was joined by the defendants in the coordinated *A & M* and *Kinney* actions, which urged that RCOA's failure to answer CBS's interrogatories prejudiced them as much as it did CBS, since RCOA's cost differential theory was the basis of the *A & M* and *Kinney* actions as well.

RCOA responded to CBS's motion by again arguing that it was entitled as a matter of right to use Rule 33(c) as the answer to the cost interrogatories. This was the very argument that the Court had rejected one year before.

Although RCOA was already in violation of the 1971 order, the Court believed it "would have been fully justified . . . in dismissing the action" (6a) because "RCOA had simply ignored the order of October 22, 1971, and offered no excuse for non-compliance" (6a), and "RCOA's unwillingness to answer created grave doubts as to whether RCOA could support at trial . . . contention[s] central to its case on both liability and damages" (7a), the Court again heard oral argument on RCOA's Rule 33(c) contention and again considered lengthy affidavits and memoranda.

Once again CBS maintained that it could not derive the answers from the proffered documents while RCOA insisted that the answers could be obtained by CBS from these records. Since counsel for RCOA represented to the Court that the CBS interrogatories could indeed be answered by RCOA and since CBS maintained that *it* had been unable to derive the answers from these records, on November 17, 1972 the Court, now for the second time, granted CBS's motion to compel answers (Appendix 2).

"For the next year and a half [from November 1, 1972 to April 1974], nothing was done by RCOA to advance its cause" (7a).

D. The A & M Interrogatories

While CBS waited patiently for RCOA to comply with the District Court's November 1972 order, defendants in the *A & M* and *Kinney* actions renewed their efforts to obtain the same type of information sought by CBS, since it was critical to the prosecution and defense of their actions.

In March, 1974, *A & M* served interrogatories upon RCOA which were substantially similar to the still unanswered CBS cost interrogatories, with one significant exception. While the CBS cost interrogatories covered RCOA's transactions from 1961 through 1969, the *A & M* interrogatories also asked for cost information regarding RCOA's transactions *after* 1969, as well as prior thereto.* In addition to these cost interrogatories, *A & M* asked RCOA to identify each occasion on which it asked for a license from certain defendants and the circumstances surrounding the request (Interrogatory 5).

E. The Kinney Interrogatories

Kinney served its cost interrogatories in January, 1973. Kinney's interrogatories were slightly different from those served by CBS and *A & M*, but were also designed to elicit cost information. Kinney asked RCOA to set forth its annual purchases of records and tapes from the Kinney record companies and alleged "co-conspirators" for the years 1967 through 1973 and also to set forth its per unit costs for records and tapes on the various Kinney labels.

In response, RCOA made the same Rule 33(c) objection which had been twice rejected by the District Court in the *CBS*

*Initial discovery in the *CBS* action was restricted by agreement of the parties to the period ending December 31, 1969. At RCOA's request, initial discovery in the *A & M* action had been broadened to include later years.

action. In addition, however, apparently realizing that such an objection was directly contrary to the *CBS* orders and a violation of the principal of "coordinated discovery" directed by the Multidistrict Panel, RCOA offered to provide as its answers in the *Kinney* action the "summary" and "analysis" of its records which was allegedly being prepared in compliance with the District Court's November, 1972, order in the *CBS* action.*

Since RCOA's answers to the *CBS* interrogatories would contain much of the information sought by Kinney, and since, under the coordination order, discovery in the *CBS* action was "deemed taken" in the *Kinney* action, Kinney relied on RCOA's offer to supply the *CBS* answers as its answers in *Kinney*. Thus, Kinney, along with CBS and A & M waited for RCOA to complete its answers.

F. RCOA's Inadequate "Answers"

In April, 1974, RCOA finally served answers to the CBS initial interrogatories. These "answers" were completely inadequate and unresponsive. Thus, RCOA had failed to identify the prefixes of the catalog numbers of most of the records which it had purchased, making it impossible to determine its precise cost of acquiring particular records. In addition, RCOA did not provide any answers at all concerning the discounts, rebates, advertising allowances and other considerations which it had received from suppliers on each of the records it had purchased. Nor had RCOA adequately answered the "non-cost" interrogatories.

In May, RCOA served its "answers" to the A & M interrogatories. These answers were even more deficient than those

*This "summary" and "analysis" was RCOA's cost interrogatory answers in the *CBS* action. In April, 1973 RCOA confirmed that Kinney would receive the *CBS* cost interrogatory answers when Kinney sent an attorney to RCOA's plant to make a general survey of RCOA's records. Kinney's attorney was told by RCOA's counsel that RCOA was doing the work necessary to answer the CBS cost interrogatories and that, when the work was completed, RCOA would give Kinney access to its answers.

in *CBS*. For the period through 1969, RCOA referred the A & M defendants to its inadequate answers in the *CBS* action. For the period after 1969, RCOA did not answer the A & M interrogatories at all. Instead, as it had done in the *Kinney* action a year earlier, RCOA repeated its Rule 33(c) objection, in direct contravention of the District Court's two prior orders in the *CBS* action. In addition, RCOA also contended that (a) the A & M interrogatories were "burdensome, oppressive, harrassing and vexatious," (b) the information could be derived from "sampling techniques," and (c) the requested information was not "directly available"—the very kind of objections which the Court had rejected in the *CBS* action in 1971. Finally, RCOA did not supply any answer whatever to A & M's Interrogatory No. 5.

In the meantime, Kinney's cost interrogatories of January, 1973 remained unanswered. Moreover, RCOA's failure to answer the CBS and A & M interrogatories was as prejudicial to Kinney as it was to CBS and A & M. The "summary", and "analysis" in *CBS* for which Kinney had been waiting since April 1973 was completely inadequate. And, as noted above with respect to the A & M interrogatories, RCOA did not serve any answers at all concerning the post-1969 period.

G. The Final Motions to Compel and the District Court's Final Orders

As a result of the complete inadequacy of RCOA's answers, in June and July 1974, the defendants in all three coordinated actions filed motions to dismiss the complaints or, alternatively, to compel further answers to the interrogatories. This was CBS's *third* motion to compel answers to interrogatories which had originally been served more than three years before.

In its motion, CBS pointed out to the District Court RCOA's history of non-compliance with the Court's orders and described in detail the deficiencies of its April, 1974 "answers." In its companion motion, A & M demonstrated that the answers to the A & M cost interrogatories for the years 1961 through 1969 were inadequate for the same reasons described by CBS in its

motion and also pointed out that RCOA's repeated reliance on Rule 33(c) for the years 1969 forward was flatly contrary to the rulings of the District Court in the *CBS* action. The Court had already twice found RCOA's records to be an inadequate source of information for the cost interrogatories. Finally, A & M also informed the Court that RCOA had not answered its non-cost interrogatory at all.

Kinney, joining the motions filed in the *A & M* and *CBS* actions, advised the Court of RCOA's offer to supply the CBS cost interrogatory answers, Kinney's reliance on this offer, the inadequacy of RCOA's answers and RCOA's omission of information for the years after 1969. Kinney also pointed out that the Court's coordination order required that the discovery in *CBS* be "deemed taken" in the *A & M* and *Kinney* actions. As a consequence, Kinney asked that the District Court apply any sanctions against RCOA across the board in all three coordinated actions.

The District Court conducted three days of hearings on the motions in July, August and September, 1974. At one of the hearings RCOA's president admitted upon cross-examination that even *he* could not ascertain from the information supplied in the computer printout certain basic RCOA cost information sought by the interrogatories. He testified that it was necessary to have additional information (which only RCOA could obtain) before those cost calculations could be made. This testimony conclusively proved that "the burden of deriving or ascertaining the answers was not substantially the same" for defendants as for RCOA (34a). Since the RCOA records did not contain complete information, it was necessary to obtain supplementary information from RCOA's employees and suppliers. Obviously, these sources were not as available to CBS as they were to RCOA.

Thus, on November 1, 1974, the District Court granted the motions to compel in all three coordinated cases and ordered RCOA to provide further answers to the interrogatories, within 30 days in the *CBS* action (Appendix 4), and within 60 days in the *A & M* and *Kinney* actions (Appendix 5). Defendants'

motions to dismiss were denied without prejudice to renewal should RCOA not satisfactorily answer.

On December 10, 1974, RCOA filed its further "answers" to the CBS interrogatories. In response to the cost interrogatories, these "answers" referred to a ten volume computer printout which had been lodged with the clerk of the District Court on December 6, 1974, but which RCOA had not served on CBS, in violation of Rule 33(a) of the Federal Rules of Civil Procedure. Although on December 10, 1974, the Court subsequently ordered that RCOA serve this printout on CBS (Appendix 6), RCOA, in violation of that order, never served it. (9a).

CBS examined the computer printout on file with the clerk. The examination revealed that these answers to the cost interrogatories were on their face incomplete, inaccurate and unresponsive. For example, RCOA had noted in handwriting many keypunch errors on the printout, which errors it did not bother to correct. CBS estimated that one-third of one volume examined appeared to consist of uncorrected keypunch errors which made the attempted answers meaningless. The answers to the non-cost interrogatories contained in the December 10 document were mere reiterations of prior answers which the Court had previously found unacceptable.

RCOA was even more disdainful of the order in the *A & M* action. It simply ignored the November 1 order *in toto* and filed no supplemental answers whatever. This disregard of the Court's order was not restricted to those interrogatories to which RCOA had directed its alleged Rule 33(c) argument; it failed fully to answer A & M's non-cost interrogatory as well.

RCOA also violated the order in the *Kinney* action. It served a few pages of incomplete, unsigned and unverified answers to only part of the interrogatories it had been directed to answer. These "answers" were preceded by the admission that they were incomplete. In addition, these answers incorporated by reference the inadequate answers filed in the *CBS* action. Finally, as in the *A & M* action, RCOA did not comply with that part of the Court's order which directed it to supply complete answers for the post-1969 period.

H. The District Court's Dismissal

In January 1975, defendants in all three cases renewed their motions to dismiss the complaints on the ground that RCOA had failed to comply with the Court's discovery orders. (This was CBS's *fourth* motion with respect to these interrogatories.) After due consideration, the District Court, on May 20, 1975, granted defendants' motions, and, in a single order and memorandum decision (1a-18a), dismissed all three actions with prejudice under Rule 37(b)(2)(C). Thereafter, the Court also denied RCOA's motion to alter, amend or vacate the judgment.

Contrary to RCOA's suggestion that on these final motions the District Court abruptly dismissed the complaints without considering RCOA's arguments, the Court deliberated on the motions for four months before rendering its decision. In reaching its result, the Court considered five affidavits which pointed out each of the deficiencies in the answers, four affidavits in opposition to the motions, as well as the interrogatories and the answers. In addition, the District Court was intimately familiar with the entire record in these actions.

In dismissing the actions, the Court found:

"that defendants' interrogatories are relevant, if not central, to RCOA's claims of liability and damages; that to the extent RCOA has answered at all, the answers provided by RCOA are inadequate and unresponsive; that there exists no valid excuse, in a case pending almost seven years, for RCOA's continued failure, over a period of almost four years, to answer fully and completely, that RCOA has wilfully disobeyed the orders of the Court requiring answers; and that dismissal of this seven-year-old litigation is not only justified, but compelled under the circumstances" (11a).

The Court noted that it had "given every conceivable latitude to RCOA in an effort to defer and ultimately avoid the sanction of dismissal" and that "RCOA had been repeatedly warned that its continued refusal to comply with the Court's

orders would inevitably lead to dismissal" (3a). Yet the RCOA answers were "inadequate and unresponsive" (11a).

The Court further found that:

"The burdens imposed upon the defendants' resources during the intervening years, the repeated hearings before the Court, the continued arguments over substantially the same or similar issues in discovery, the repeated assurances of future compliance, followed by continued failure or refusal to comply, the continued use or misuse of judicial time and resources and the undesirable congestion of court calendars and dockets compel the conclusion here reached" (13a).

The Court of Appeals, quoting extensively with approval from the District Court's opinion, unanimously affirmed the District Court's decision and held that the dismissal of these actions was fully supported by the record.

ARGUMENT

There is no reason for granting certiorari here. These cases involve the application of well-established and routine discovery rules to unique facts. They do not give rise to any important unsettled questions of federal law. The District Court, in its discretion, dismissed because of RCOA's contumacious disregard of a number of court orders over a period of years. The Court of Appeals, in strict compliance with this Court's decision in the *National Hockey League* case, *supra*, found that the record supported the District Court's order and that there was no abuse of discretion.

These cases do not give rise to any unsettled general questions regarding the interpretation of Rule 33(c); there are no decisions in conflict on the issues raised by these cases; no congressional purpose is frustrated by the decisions here which merely require a litigant to comply with the rules and court orders; and, finally, after four years of hearings and arguments, due process certainly was not violated.

I.

**RCOA's RULE 33(c) ARGUMENT IS UNSUPPORTED
BY THE RECORD.**

In 1971, RCOA, objecting to the CBS interrogatories, claimed that the answers thereto could be derived from RCOA's documents. The Court heard argument on this issue and considered all of the affidavits and memoranda submitted before ordering RCOA to answer. The fact that the Court made no formal findings in issuing its order is irrelevant. Such findings are not required by Rule 33(c) or any other rule. The District Court considered evidence on the issues of whether or not the RCOA documents in fact contained the information sought and whether or not the burden of obtaining it was equal between the parties and ruled against RCOA (5a-7a). The Court of Appeals, in reviewing the record, found that the evidence supported the District Court's refusal to allow RCOA to utilize Rule 33(c) in the circumstances of these cases (33a-38a).*

In 1972, when RCOA again sought refuge in Rule 33(c) *in regard to the same interrogatories*, the Court again consid-

*RCOA's suggestion that it is the type of party which Rule 33(c) was designed to protect (Petition, p. 10) erroneously implies that RCOA had limited resources at the time the Court ordered it to answer the interrogatories. This is not the case. As pointed out at page 4, *supra*, RCOA was enjoying spectacular growth at this time.

Both the District Court and the Court of Appeals considered and rejected RCOA's belated argument that its poor financial condition excused it from complying with the Court's orders. The District Court said:

"Were this the first time RCOA's failure had come before the Court, RCOA's financial condition might conceivably have a bearing upon the scope of any order requiring answers. It would not serve, however, to excuse a plaintiff from providing any information at all. However, on this record of repeated disobedience to the Court's orders and prolonged delay in providing any responsive information during a long period involving no financial distress, RCOA's present and most recent financial condition cannot excuse its continuing non-compliance. (15a)

The Court of Appeals expressly affirmed this finding (38a).

ered affidavits. CBS insisted that it could not obtain answers to its interrogatories from the RCOA documents. It pointed out that the documents alone did not supply the information sought and that additional facts known only to RCOA's employees and suppliers were necessary in order to obtain complete answers. Indeed, it had been as a result of CBS's examination of the documents tendered by RCOA in response to CBS's earlier Rule 34 motion, that CBS found it was necessary to propound the cost interrogatories to obtain the required information. Since RCOA kept assuring the Court that, even if CBS could not, RCOA could answer the interrogatories from the proffered documents, the Court, after due consideration of the arguments regarding the sufficiency of the documents offered and the burden of reviewing them, again ordered RCOA to answer.

The fact that RCOA, more than three years after it was first ordered to answer, did not answer the interrogatories from the documents tendered, and that RCOA's own president testified in 1974 that he could not cull the information sought from the computer printout RCOA offered as RCOA's answer, conclusively demonstrated that the documents tendered did not answer the interrogatories. Thus, there is no support in the record for RCOA's Rule 33(c) argument.*

*RCOA now apparently claims that the 1971 Strauss affidavit offered by CBS is "impeached" by what appear to be excerpts from documents, attached as Appendices C and D to the petition, which were not produced in discovery in any of these cases. (RCOA does not challenge the Gilbert affidavit, which, like the Strauss affidavit, also stated that the RCOA documents did not contain the information sought by the interrogatories.) These documents were not presented by RCOA to the courts below. Factual issues not raised below should not be considered by this Court absent compelling circumstances which do not here exist. *Giordenello v. United States*, 357 U. S. 480, 488 (1958). See *Delaware & C. R. R. v. Koske*, 279 U. S. 7, 10 (1929); *New York Dock Company v. Steamship Poznam*, 274 U. S. 117, 123 (1927). In any event, RCOA does not explain how these documents controvert the Strauss affidavit. The CBS interrogatories sought information regarding RCOA's costs from 1961 forward. Appendices C and D concern RCOA's sales from October, 1972, to September, 1973. This irrelevant evidence produced at the last moment should be ignored by this Court.

RCOA's petition asks this Court to review the evidence *de novo* and to substitute its judgment as to whether or not the proffered documents adequately answered the interrogatories for that of the District Court and the Court of Appeals. Such a review would be completely contrary to this Court's holding in the *National Hockey League* case.

RCOA argues that "neither *Kinney* nor *A & M* alleged that the requirements of Rule 33(c) were not met with respect to their cost interrogatories" (Petition, p. 13). This contention is meritless. RCOA answered the *A & M* and *Kinney* interrogatories in part by referring defendants in those actions to its interrogatory answers in the *CBS* action. The Court had before it voluminous evidence in the coordinated *CBS* action that the documents tendered did not contain the information sought. This issue had been argued and reargued repeatedly in the *CBS* action and the Court had ruled that Rule 33(c) was not appropriate in the circumstance of these cases. The *A & M* and *Kinney* actions had been transferred by the Multidistrict Panel for coordinated pretrial discovery in order to avoid wasteful and unnecessary relitigation of this very type of issue. It would have defeated the whole purpose of coordination if the District Court had permitted RCOA to relitigate this issue in the *A & M* and *Kinney* actions.

Finally, RCOA's Rule 33(c) argument is irrelevant. Assuming arguendo and contrary to fact that the District Court had ignored RCOA's Rule 33(c) arguments, there is no causal connection between the Court's rulings on Rule 33(c) and the dismissal, for RCOA had assured the Court for three years that it could and would answer the interrogatories. RCOA had over three years to supply answers from the time the Court first rejected RCOA's Rule 33(c) argument. It is not as if RCOA stood on Rule 33(c) in 1971, took a dismissal on that basis and then appealed. It said it would comply, it delayed the case for three years during that time, and, finally, it still failed to answer the interrogatories. Such a record does not justify any decision by the Supreme Court regarding the interpretation and requirements of Rule 33(c).

RCOA's Rule 33(c) argument is also irrelevant for another reason. RCOA failed to answer some interrogatories to which the Rule 33(c) argument does not apply at all.* The Court dismissed the cases for RCOA's disregard of orders to answer these interrogatories as well. Certiorari based on RCOA's Rule 33(c) argument will not dispose of RCOA's failure to answer these interrogatories.

II.

THERE IS NO CONFLICT IN THE CIRCUITS WHICH REQUIRES REVIEW BY THE SUPREME COURT.

As the Court of Appeals for the Third Circuit pointed out in its decision below (34a), *Daiflon, Inc. v. Allied Chemical Corp.*, 534 F. 2d 221 (10th Cir.), *cert. denied*, 45 LW 3275 (October 12, 1976), is "quite different" from these cases. In *Daiflon*, the Court of Appeals for the Tenth Circuit overturned the District Court's dismissal of the complaint for plaintiff's failure to comply with discovery orders. The Court of Appeals held that the District Court should have permitted plaintiff to rely upon Rule 33(c) in response to defendants' interrogatories. Unlike these actions, there was no evidence introduced by the defendants in *Daiflon* which controverted plaintiff's sworn statement that the information sought in defendants' interrogatories was available from plaintiff's books

*Thus, in answering the *CBS* interrogatories in 1974, RCOA reiterated its answers to the non-cost interrogatories which the Court had found unsatisfactory in 1971 and 1972. For example, in 1972 "as to the damage and conspiracy interrogatories, RCOA refused to answer until completion of discovery . . . a ground RCOA had raised formerly by its objections" (26a) and which the Court had overruled in 1971. Then, in April, 1974, RCOA's answers to the non-cost interrogatories "[f]or the most part . . . directed CBS to documents submitted with previous answers or suggested that the information requested be culled from CBS's own files" (28a). The documents which had been attached to the previous answers had proved on their face not to contain the information. Finally, in December, 1974, RCOA again gave the same answers to the non-cost interrogatories which the Court had rejected in 1972. A summary of the cost and non-cost answers is contained in the Court of Appeals opinion (36a-37a; n. 17). Similarly, RCOA did not fully answer *A & M's* Interrogatory No. 5.

and records. Further, in contrast to the record here, there was no evidence before the Court in *Daiflon* which would have supported a determination that the burden of ascertaining an answer to the interrogatory in question would be less for plaintiff than for the defendants.

Here, the District Court had before it all of the evidence it needed to decide whether the interrogatories could be answered from the documents specified and the relative burden of answering between the parties. It heard extensive oral arguments, read affidavits and memoranda which were specifically directed to these questions and held an evidentiary hearing. Under these circumstances, the Court of Appeals properly upheld the District Court's determination that the RCOA documents were insufficient and that the burden between the parties was not equal. Thus, the Court of Appeals' holding that the record in *Daiflon Inc.* was "quite different from that in this case" (34a) was absolutely correct.

In contrast to *Daiflon*, the Third Circuit's decision here conforms to this Court's *National Hockey League* ruling which upheld the dismissal of a complaint for plaintiff's failure to comply with discovery orders. Indeed, the facts here are far more egregious than the facts involved in the *National Hockey League* case. There, the District Court had dismissed the complaint after plaintiff had failed to answer interrogatories for 17 months. RCOA failed to answer the CBS interrogatories for a period of over four years and after repeated court orders. It failed to answer some of the A & M and Kinney interrogatories at all. RCOA's flagrant bad faith is stamped all over the record. The District Court, finding the answers to crucial interrogatories inadequate for the fourth time, and having exhausted all other alternatives, finally dismissed the actions. The Court of Appeals, finding full support for the order of the District Court, unanimously affirmed.

III.

THE DISMISSAL OF THE KINNEY ACTION DID NOT VIOLATE RCOA'S RIGHT TO DUE PROCESS.

RCOA's final alleged reason why certiorari should be granted solely concerns the *Kinney* action. RCOA contends (Petition,

pp. 16-17) that, although it admittedly did not comply with the District Court's November 1, 1974, order in the *A & M* action, it *did* comply with the Court's companion order in the *Kinney* action and that *Kinney* was only dismissed because the District Court improperly considered RCOA's violations of the orders in the *CBS* action. RCOA asserts that such dismissal was improper "punishment" for its conduct in the coordinated *CBS* action and thus that it was denied "due process." There is no merit to this claim.

First, as noted above, page 13, the *Kinney* action was dismissed because RCOA did *not* comply with the District Court's November 1, 1974 order in the *Kinney* action. As the District Court and the Court of Appeals noted, RCOA's answers to the *Kinney* interrogatories were "inadequate on their face" (10a) and not in "substantial compliance" (58a). For the pre-1969 period, RCOA had incorporated by reference the answers to the *CBS* interrogatories which the Court had found to be completely deficient. For the post-1969 period, it did not supply the required information. These violations of the November 1 order alone justified dismissal of the *Kinney* action.

Second, the District Court's consideration of RCOA's continued failure to comply with discovery orders in the coordinated actions in deciding upon an appropriate sanction in *Kinney* did not deprive RCOA of "due process." To the contrary, such consideration was a sound exercise of discretion necessary to the fulfillment of the purpose of coordination. As the Court of Appeals stated (58a):

"Since *A & M* and *Kinney* had to rely on the answers to these *CBS* interrogatories in the cases against them and the answers made by RCOA to the similar *A & M* and *Kinney* interrogatories were, in large part, the same as those made to *CBS*, we deem justified the District Court's reliance on RCOA's disobedience of those orders in directing dismissal in the *A & M* and *Kinney* actions."

The record in the *Kinney* action amply supports the Court of Appeals' holding.

From the outset of the *Kinney* action, RCOA was aware that *Kinney's* defense of this action would require the same inquiry

into RCOA's cost of acquiring records and tapes made in the *CBS* and *A & M* actions. The purpose of Multidistrict's Panel's transfer of the *Kinney* action to the Eastern District of Pennsylvania was to permit common discovery on this issue (342 F. Supp. 1177-78).

As early as November, 1972, Kinney made it clear to RCOA that it was depending on the answers to the CBS cost interrogatories when it joined CBS's second motion to compel, pointing out that RCOA's failure to answer CBS's cost interrogatories was equally prejudicial to Kinney.*

Moreover, RCOA recognized that Kinney sought the CBS interrogatory answers and, in March, 1973, promised to supply these answers in the *Kinney* action.

In April, 1973, at RCOA's request, the District Court entered an order expressly providing for coordination of the discovery in all three coordinated cases (Appendix 3). The Court's order provided that all discovery taken or produced in the *CBS* action would be "deemed to be taken or produced" in the *A & M* and *Kinney* actions as well, thus entitling Kinney to rely on the RCOA answers to the CBS interrogatories and to be a beneficiary of the discovery orders in *CBS*. As the Court of Appeals stated in its opinion:

"... [The] coordination order was intended to make all prior and future discovery orders in the *CBS* case, unless otherwise necessary, applicable to the *A & M* and *Kinney*

*In its motion, Kinney asserted:

"The Interrogatories which plaintiff has refused to answer concern the fundamental issues not only in the *CBS* and *A & M* cases but in the *Kinney* case as well, namely, cost, conspiracy and damages. As the Multidistrict Panel recognized in its two orders transferring the *A & M* case and the *Kinney* case to this Court, plaintiff's grievance in all three cases is the same. . . . In these coordinated pretrial proceedings, plaintiff's violation of this Court's October 22, 1971 order and its refusal to adequately answer these key CBS interrogatories under oath prejudices Elektra, Kinney and WEA just as much as if these interrogatories had been formally filed by Elektra, Kinney and WEA in the *A & M* and *Kinney* actions."

actions. It is highly illogical to assume that a legal ruling judging the adequacy of answers to certain interrogatories, which are deemed available to all parties in the *CBS*, *A & M* and *Kinney* actions, and orders compelling further answers to those interrogatories, should not apply equally to all of the parties [footnote omitted] (57a)."

In July, 1974 Kinney moved to dismiss the *Kinney* action after the answers prepared by RCOA in the *CBS* action were served and proved to be completely inadequate as answers in *CBS*, or as answers in *Kinney*. In November, 1974, the Court ordered further answers to Kinney's interrogatories within 60 days (Appendix 5).

In January, 1975, after the initial deadline set by the District Court, RCOA served admittedly incomplete answers to the Kinney interrogatories. It prefaced its answers by stating: "Plaintiff is unable at this time to supplement fully the indicated interrogatories. . . ." And, most important, it again offered to supply the totally deficient CBS interrogatory answers, including a "computer price study", as its responses in the *Kinney* action.

CBS demonstrated, and the District Court found, that RCOA's answers, including the "computer price study" were on their face incomplete, inaccurate and unresponsive. Accordingly, RCOA, by violating the orders in the *CBS* action, had violated the *Kinney* order as well and the District Court properly dismissed the *Kinney* complaint.

The cases cited by RCOA in the petition (pp. 16-17) are inapposite. *Southern Railway Co. v. Templar*, 463 F. 2d 967 (10th Cir. 1972) held that one party in a coordinated case may not be penalized for violating an order entered against another party. Here, the District Court fashioned sanctions against RCOA in *Kinney*, not for the default of some other party, but because of RCOA's own violations of discovery orders entered against it in each of the coordinated actions, including the *Kinney* action itself.*

* *In re U. S. Financial Litigation*, 64 F. R. D. 76 (S. D. Cal. 1974) simply stands for the proposition that an SEC proceeding may be consolidated or coordinated with related private actions. It is irrelevant to the issue here.

The District Court did not punish RCOA for "general misbehavior," the ruling which was set aside in *Dorsey v. Academy Moving & Storage, Inc.*, 423 F. 2d 858, 860-61 (5th Cir. 1970); See also *Mitchell v. Johnson*, 274 F. 2d 394 (5th Cir. 1960). The complaints here were dismissed because of RCOA's deliberate and specific failure to comply with the District Court's orders in all three of the coordinated actions.

In sum, the ruling below dismissing the *Kinney* action was fully supported by the record, was a proper exercise of discretion and does not raise any issue of "due process" warranting review by this Court.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: November 17, 1976

Appendix 1

Order of October 22, 1971

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 68-1132, 71-220

RECORD CLUB OF AMERICA, INC.

v.

COLUMBIA BROADCASTING SYSTEM, INC. ET AL.

MDL DOCKET No. 59

IN RE:

CBS LICENSING ANTITRUST LITIGATION

ORDER

TROUTMAN, J.

AND NOW, this 22nd day of October, 1971, oral argument of various motions in the following sequence having been heard, It IS ORDERED:

1. That motion of Columbia Broadcasting System, Inc. to compel plaintiff to produce Mark Lewis for his oral deposition is GRANTED;

2. That plaintiff's motion to compel Columbia Broadcasting System, Inc. to produce documents is GRANTED; IT IS FURTHER ORDERED that said documents shall be produced only upon the completion of the deposition of Mark Lewis (paragraph 1, supra) and upon the completion of the deposition of Sigmund W. Friedman (paragraph 5, infra) and shall be used in strict compliance with the stipulation and order of confidentiality heretofore entered in this case on February 12, 1969; IT IS FURTHER ORDERED that plaintiff's motion seeking payment of reasonable expenses and counsel fees is DENIED;

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Appendix 1

Order of October 22, 1971

3. That plaintiff's motion for modification of said stipulation and order of confidentiality for the purpose of communicating with the Federal Trade Commission is DENIED;

4. That plaintiff's motion to compel answer to interrogatories is, as to Interrogatories Nos. 23E, 23F and 26, GRANTED, and is otherwise DENIED;

5. That motion of Columbia Broadcasting System, Inc. to compel Sigmund W. Friedman to answer certain questions is, as to those questions relating to the use of confidential documents by the witness (page 4 et seq. of said motion), GRANTED; and is otherwise DENIED;

6. That plaintiff's motion for modification of said stipulation and order of confidentiality to use, in a separate proceeding, fourteen license agreements heretofore produced, is DENIED;

7. That, except as to those interrogatories relating to tapes prior to August 1969, plaintiff's motion to compel Columbia Broadcasting Company to answer interrogatories is GRANTED and objections filed thereto by Columbia Broadcasting System, Inc. are DENIED;

8. That motion of Columbia Broadcasting Company to compel the production by the plaintiff of certain documents therein detailed is GRANTED;

9. That motion of Columbia Broadcasting System, Inc. to compel plaintiff to answer initial interrogatories is GRANTED;

10. That motion of Columbia Broadcasting System, Inc. to compel plaintiff to designate and identify all documents being withheld on the ground of privilege is GRANTED.

BY THE COURT,

E. MAC TROUTMAN

J.

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Appendix 2

Order of November 17, 1972

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL DOCKET No. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION No. 68-11

RECORD CLUB OF AMERICA, INC.

v.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

**TRANSCRIPT OF ORAL ORDER OF THE
DISTRICT COURT ON NOVEMBER 17, 1972**

"No. 3, motion of the Defendant CBS to compel the Plaintiff RCOA to submit further answers to interrogatories. This motion is granted at the cost and expense of the Plaintiff RCOA. As to any answers which have already been completed without reference to Rule 33(c) and as to which the Plaintiff contends it has submitted all information presently available, there is a continuing obligation to further answer such interrogatory as such information becomes available" (page 929 of the Joint Appendix filed with the Court of Appeals for the Third Circuit).

"Motion No. 4, which is CBS' motion to dismiss, is denied, without prejudice to its renewal in the event of non-compliance with the order heretofore entered (page 930 of the Joint Appendix filed with the Court of Appeals for the Third Circuit).

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Appendix 3.
Order of April 11, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL No. 59

IN RE:

CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION No. 68-2232

RECORD CLUB OF AMERICA, INC.

v.

COLUMBIA BROADCASTING SYSTEM, INC. ET AL

70 Civ. 2320 (S. D. N. Y.)

RECORD CLUB OF AMERICA, INC.

v.

A & M RECORDS, ET AL.

71 Civ. 5096 (S. D. N. Y.)

RECORD CLUB OF AMERICA, INC.

v.

KINNEY SERVICES, INC. ET AL.

ORDER

TROUTMAN, J.

IT IS HEREBY ORDERED:

(1) That all testimony, documents, or other information (hereinafter "discovery") taken or produced in any action now

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Appendix 3
Order of April 11, 1973

coordinated for pre-trial proceedings before the United States District Court for the Eastern District of Pennsylvania under the style "CBS licensing antitrust litigation (MDL No. 59)" (hereinafter "coordinated actions") shall be deemed taken or produced in each such action, subject to the provisions of this stipulation, provided that nothing herein shall be deemed to preclude any party from taking whatever discovery it deems necessary for the preparation or trial of any of these coordinated actions;

(2) That all discovery denominated as confidential (hereinafter "confidential discovery") heretofore or hereinafter taken or produced by any party hereto shall be disclosed only to counsel for the parties to any coordinated action, and to such other persons, including principals, officers, agents, servants and independent consultants of the parties, with whom counsel for such party deems it necessary to consult in order to prepare or try any of these coordinated actions;

(3) That no person obtaining access to any confidential discovery shall make copies, reveal, disseminate or use the contents thereof for any purpose other than the preparation or trial of these coordinated actions;

(4) That any confidential discovery filed with the Court prior to trial of any coordinated action shall be kept *in camera*, but may be examined by counsel to any of the parties to any coordinated action;

(5) That promptly after the conclusion of each round of discovery in these coordinated actions, each of the parties will disclose in writing to all parties hereto, the name and business address of each individual other than counsel for the parties to any coordinated action who has obtained access to any confidential discovery;

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Appendix 3
Order of April 11, 1973

(6) That the obligations of confidentiality contained herein shall continue until the conclusion of pre-trial proceedings in the coordinated actions;

(7) That prior to disclosing to any person any confidential discovery, counsel making such disclosure shall deliver to such person a copy of this order and such person shall sign a copy of this order and deliver it to such counsel agreeing to be bound by the provisions hereof and counsel shall inform such person that violation of the provisions hereof shall be subject to sanctions of the Court;

(8) That no party shall object to discovery on the ground of confidentiality;

(9) That this order shall supersede all prior confidential stipulations and orders entered in any of the coordinated actions.

E. MAC TROUTMAN
J.

Signed this 11th day of April, 1973.

Read and agreed to this
day of , 1974

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Appendix 4
Order of November 1, 1974 (CBS action)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL DOCKET No. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION No. 68-11

RECORD CLUB OF AMERICA, INC.

v.

COLUMBIA BROADCASTING SYSTEM, INC. ET AL.

ORDER

TROUTMAN, J.

AND NOW, this 1st day of November, 1974, upon consideration of the memoranda, testimony and arguments made by counsel, IT IS ORDERED that the motions of defendant Columbia Broadcasting Systems, Inc. and the motions of the Warner defendants

(1) for an order compelling plaintiff Record Club of America, Inc., to make further answers to interrogatories 1 and 2 (i-xi) as to include prefix numbers as a part of the catalogue number is GRANTED;

(2) for an order compelling plaintiff RCOA to make further answers to interrogatories 1(iv), 1(xiv), 1(xxi), 1(xxii), 2(viii), 2(ix), 2(x), 2(xi), 4(viii), 4(ix), 4(xii), 4(xiii), 4(xiv), 4(xvi), 4(xix), 4(xxii), 4(xxiii), 4(xxiv), 5, 6, 23(v) and 24 is GRANTED and is otherwise DENIED.

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Appendix 4

Order of November 1, 1974 (CBS action)

Said answers shall be filed within thirty (30) days from the date of this order and, accordingly, IT IS FURTHER ORDERED that

(1) defendants' motions to dismiss this action or for an order precluding certain evidence at trial is DENIED without prejudice to its renewal in the event that supplemental answers are not filed within thirty (30) days from the date of this order;

(2) defendants' motion for an award of costs is DENIED without prejudice to its renewal in the event supplemental answers are not filed within thirty (30) days from the date of this order; and

(3) defendants' motion for an order continuing the stay of discovery in this action is GRANTED and said stay will remain in effect pending compliance with this order until otherwise ordered by the Court.

E. MAC TROUTMAN
J.

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Appendix 5

**Order of November 1, 1974
(A & M and Kinney actions)**

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL DOCKET No. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION
CIVIL ACTION No. 70-2320 (S. D. N. Y.)

RECORD CLUB OF AMERICA, INC.
v.
A & M RECORDS, ET AL.

CIVIL ACTION No. 70-5096 (S. D. N. Y.)

RECORD CLUB OF AMERICA, INC.
v.
KINNEY SERVICES, INC. and WARNER-ELEKTRA-ATLANTIC
DISTRIBUTING CORP.

ORDER

TROUTMAN, J.

AND NOW, this 1st day of November, 1974, upon consideration of the memoranda submitted in connection herewith, IT IS ORDERED that the motion of defendant A & M Records et al.

(1) for an order compelling plaintiff RCOA, Inc. to make further answers to interrogatories 1, 2, 3, 4 is GRANTED;

(2) for an order compelling plaintiff RCOA to make further answers to interrogatory 5 with respect to entities named in interrogatories 1(vii) and 2(v), 2(vi), 2(viii) and 2(ix) and with respect to the period 1970-1973 is GRANTED and otherwise DENIED.

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Appendix 5

Order of November 1, 1974 (A & M and Kinney actions)

IT IS FURTHER ORDERED that the motion of defendant Kinney Services, Inc. and Warner-Elektra-Atlantic Distributing Corp. to compel further answers, and to include the period 1970-1973, to its interrogatories 16(g), 16(i) and 35(d) is GRANTED.

Said answers shall be filed within sixty (60) days from the date of this order, and IT IS FURTHER ORDERED that:

(1) defendants' motions to dismiss this action or for an order precluding certain evidence at trial are DENIED without prejudice to their renewal in the event that supplemental answers are not filed within sixty (60) days from the date of this order;

(2) defendants' motions for an award of costs are DENIED without prejudice to their renewal in the event supplemental answers are not filed within sixty (60) days from the date of this order;

(3) defendants' motion for an order staying further discovery is DENIED.

E. MAC TROUTMAN
J.

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Appendix 6

Order of December 30, 1974

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL DOCKET No. 59

IN RE:
CBS LICENSING ANTITRUST LITIGATION

CIVIL ACTION No. 68-1132

RECORD CLUB OF AMERICA, INC.

v.

COLUMBIA BROADCASTING SYSTEM, INC. ET AL.

ORDER

TROUTMAN, J.

AND NOW, this 30th day of December, 1974, upon consideration of the mandatory language of FRPC #33, IT IS ORDERED that the plaintiff shall furnish defendants with copies of answers to interrogatories filed on December 6, 1974.

E. MAC TROUTMAN
J.

FILED

Jan. 5

JOHN J. HARDING, CLERK

ByDEP. CLERK